

FINAL  
REPORT



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**Maine Commission on Indigent Legal Services (MCILS)** – An evaluation of MCILS’s structure of oversight and the adequacy of its systems and procedures to administer payments and expenditures.

Report No. SR-MCILS-19

November

2020

a report to the  
**Government Oversight Committee**  
from the  
**Office of Program Evaluation & Government Accountability**  
of the Maine State Legislature

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DANIELLE D. FOX  
DIRECTOR



MAINE STATE LEGISLATURE  
OFFICE OF PROGRAM EVALUATION AND  
GOVERNMENT ACCOUNTABILITY

November 9, 2020

Sen. Justin M. Chenette, Chair  
Rep. Anne-Marie Mastraccio, Chair  
Members Government Oversight Committee

As directed by the 129<sup>th</sup> Legislature's Government Oversight Committee (GOC), and in accordance with the scope approved by the Committee, OPEGA has completed the first phase of a review of the Maine Commission on Indigent Legal Services (MCILS). The GOC, on January 10, 2020 directed OPEGA to expedite a review of 2 of the 5 evaluation areas listed in the project direction statement which can be found in Appendix A. OPEGA anticipated presenting this expedited report in April, but this was delayed due to the adjournment of the Legislature because of COVID 19. The project direction statement was approved on December 10, 2019. The two evaluation areas addressed in this report are the:

1. Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent; and
2. adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

OPEGA would like to thank the management and staff of MCILS for their cooperation throughout this review.

In accordance with Title 3 §997 sub-§1, OPEGA provided MCILS an opportunity to review the report draft for the purposes of providing a formal agency comment to be included with this report. Their response can be found at the end of this report.

Sincerely,

A handwritten signature in blue ink that reads "Danielle D. Fox".

Danielle D. Fox  
Director, OPEGA

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# Maine Commission on Indigent Legal Services - An

evaluation of MCILS's structure of oversight and the adequacy of its systems and procedures to administer payments and expenditures.

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## Part I. Introduction and Background

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### **About the Maine Commission on Indigent Legal Services and OPEGA's evaluation**

As written in statute, the purpose of the Maine Commission on Indigent Legal Services (MCILS) is to provide efficient, high quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases. MCILS is comprised of the Commission itself and what we will refer to in this report as the “agency.” The agency refers to the office staff who administer the day-to-day functions of MCILS and supports the workings of the Commission.

The Government Oversight Committee (GOC) directed OPEGA to expedite two elements of a broader evaluation of MCILS on January 10, 2020<sup>1</sup>.

- Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
- Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

This evaluation will speak to each of those areas and what OPEGA found. Our review of the financial functions includes an examination of the systems used by the agency to process invoices, vouchers and payments and the methods employed by the agency to detect potential overbilling. OPEGA accessed from the agency, or independently obtained, MCILS's financial data to evaluate both the adequacy of those systems, and the methods employed by the staff, in administering the financial responsibilities of the agency. In Part II of this report, OPEGA details our analysis of the financial data and identifies issues with the effectiveness and efficiency of those systems and methods. The data obtained by OPEGA covers financial information from FY09 through FY19. Unless otherwise indicated, our analysis of the data applies to that time period. With regard to MCILS's oversight structure, OPEGA applied a more qualitative approach to evaluate that structure and identify weaknesses. Part III of this report discusses the overall weakness of this structure, by describing inadequate staffing levels and inefficient use of staff resources within the agency, resulting in a lack of appropriate support to facilitate the Commission's responsibility to establish and

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<sup>1</sup> See appendix A for Project Direction Statement

monitor a system intended to ensure that efficient, high quality legal representation is provided to criminal defendants in the state (and others) who are determined to be indigent or partially indigent.

## Overview of MCILS

### Establishment of MCILS and organizational structure

MCILS was established as an independent commission in 2009. Prior to its establishment, indigent legal services were administered by and funded through the Judicial Branch. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. The Commission is made up of nine members (currently one vacancy), and is supported by an office staff of four, who administer the day-to-day operations of the agency. As stated in 4 MRSA

**The purpose of MCILS is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases - 4 MRSA §1801.**

§1801, the purpose of MCILS is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. Indigent defendants are those without sufficient means to retain the services of competent counsel. This representation is provided in accordance with requirements established in statute and in both the Constitution of the United States and the Constitution of Maine. Statute requires that the Commission work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the state and to ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner.

In 2018, a change to 4 MRSA §1803 increased the number of members appointed to serve on the Commission from five to nine. Statute provides for certain representation on the Commission, including; one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are practicing attorneys providing indigent legal services.

As currently structured, MCILS agency staff includes an Executive Director, Deputy Executive Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time and remotely. The Office Associate position was vacant for over two years due to a hiring freeze – it was filled in June 2019.

For fiscal year 2020, the Legislature appropriated approximately \$17.7 million for MCILS and \$17.6 million for fiscal year 2021.

### Representation for indigent or partially indigent

In Maine, representation for those who have been determined indigent, or partially indigent, is provided by attorneys in private practice, rather than state-employed public defense attorneys. The



Court assigns representation to a person by selecting an attorney from rosters maintained by MCILS, which are separated by region. In order to be listed on a roster, attorneys must have met basic requirements, along with certain ongoing requirements, such as continuing education. There are separate rosters for attorneys who provide specific types of services, or have a defense specialty, including homicide, sexual offenses, operating under the influence, domestic violence, serious violent felonies, and juvenile felony cases.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring and seeking representation. At some court locations, a financial screener may be available to collect information to be considered as part of that judicial determination. The screener meets with the defendant, gathers financial information, including the defendant's assets, income, and expenses and uses this information to provide a recommendation to the judge. The judge may determine that the person is indigent or partially indigent, in which case a rostered attorney will be assigned. A person determined partially indigent will receive an order to make payments making up a portion of the assigned attorney's fees.

#### Attorney and non-counsel payments

A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned to represent indigent or partially indigent clients. Attorneys submit a voucher for payment to the agency via the electronic case management program, Defender Data. The Executive

**A primary function of MCILS is to arrange for the payment of counsel fees and expenses to attorneys who have been assigned to represent indigent and partially indigent clients.**

Director and Deputy Executive Director review these vouchers and approve attorney payments. The hourly rate for attorneys is currently \$60, with maximum fee caps per type of case. Any services provided by vendors hired by the attorney, such as investigators, interpreters, and medical and psychological experts, are to be pre-approved by either the Executive Director or Deputy Executive Director. The vendor sends an invoice to the attorney, who verifies satisfactory completion of that work and then the invoice is submitted to the agency for processing. MCILS staff makes payment directly to the vendor.

Until June 30, 2019, an alternate method to pay for legal services was facilitated by MCILS in the form of a single, fixed-fee contract in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. This contract was not renewed and currently MCILS is not using this alternate method to pay for legal services.

## Part II. Systems and Procedures Used by MCILS Staff to Process Payments and Expenditures Associated with Providing Legal Representation

### Are the systems and procedures used by MCILS to process payments and expenditures associated with providing legal representation adequate?

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OPEGA was tasked with determining the adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent. In this section, we identify several issues with the systems and procedures used by the agency to process attorney and non-attorney payments.

- **There are no established policies and procedures governing expenditures and payments - and MCILS expectations for billing practices may not be effectively communicated to attorneys.**
- **Data available to MCILS staff via Defender Data is unreliable and potentially misleading.**
- **Current monitoring efforts of attorney vouchers are inefficient and of limited effectiveness.**
- **Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.**
- **Audit or review procedures have not been established and current audit efforts used by MCILS are limited, inconsistent, and of limited scope, depth and effectiveness.**

Some of these issues associated with the agency's financial procedures appear to be linked to our assessment of the MCILS oversight structure discussed in Part III, where we describe the interconnectedness of inadequate agency staffing and poor functioning of the Commission. Had the agency been appropriately staffed and the Commission been more functional, it is possible that some of these financial procedure issues may have been mitigated. OPEGA notes, however, that due to the prioritization of the two questions (financial procedures and oversight structure), we did not conduct a full review including all of the evaluation scope areas outlined in the GOC's original project direction statement. Thus, OPEGA did not fully establish the root cause for all identified issues. Nonetheless, there appears to be a link between the poorly functioning organizational oversight structure, inadequate staffing, and inadequate financial procedures.

One of the primary drivers for this review were the issues noted in a report issued by the Sixth Amendment Center (6AC) in April 2019. Of particular concern were the number of annual hours

billed by rostered attorneys and MCILS's ability to identify such occurrences—which were later reported by the media as potential examples of overbilling and/or fraud. Appendix C of this report includes a comparison of the previously reported attorney billing analysis conducted by the 6AC to an analysis conducted by OPEGA, using data we independently obtained directly from the billing service provider. As described in the Appendix, the magnitude of the 6AC's finding appears to be overstated. However, the underlying issues—attorneys billing for large amounts of hours annually and MCILS's ability to identify when that happens—remain valid. These issues are explored in this Part and are discussed in detail in Issue 3.

**Issue 1. There are no established policies and procedures governing expenditures and payments and - MCILS's expectations for billing practices may not be effectively communicated to attorneys.**

The system used by MCILS staff to govern billing practices by rostered attorneys, and to guide the agency's approval of payments, is limited. Necessary policies and procedures that would outline expectations for attorneys submitting vouchers are sparse and are not in written form or otherwise codified. Of greater concern, the few standards that do exist in writing -the (established) fee schedule in agency rules which outline allowable and covered expenses -may not be effectively communicated to attorneys. A process, or system, reliant upon unwritten standards which are not widely communicated to attorneys—when agency review of payment submissions is governed by those standards—is one of potentially limited effectiveness.

Among the sparse procedures, OPEGA did observe some standards developed by the Executive Director and Deputy Executive Director, for their use in approving certain work event entries on attorney vouchers—procedures which they describe as “informal.” Specifically, these unwritten standards guide staff's treatment of attorney voucher entries billing for the attorney's time spent on common, or generic, work activities. These standards include maximums for events, like opening a file – which is subject to a limit of .5 of one hour (the system records time in tenths of an hour). If an attorney submits a voucher that includes an entry for opening a file exceeding that amount of time, and the attorney provided no note to explain the duration of time taken to complete that activity, MCILS staff would presumably reject, or question, that entry on the voucher. It is important to note again that these billing standards are not established as policies and are otherwise unwritten. Based on the frequency with which OPEGA noted nonconformity with these informal standards, it also appears that these standards may not be communicated effectively to rostered attorneys.

**Voucher-level review conducted by MCILS staff relies on information entered into Defender Data by attorneys who are provided only sparse, informal guidance on billing standards.**

A fee schedule, governing payments to assigned counsel, written and formally established in agency rules (94-649 Chapter 301), states the hourly rate paid to attorneys (currently \$60) and outlines which services are to be billed under that rate. The rules state that “routine office expenses are considered to be included in the hourly rate.” Among the routine office expenses defined in the fee

schedule are office overhead, utilities, and secretarial services. MCILS staff has interpreted secretarial services to include most paralegal services<sup>2</sup>. In other words, if an attorney worked for 10 hours on a particular case and a paralegal also provided 2 hours of work in support, the attorney is only authorized to be paid for 10 hours of work (not twelve) in accordance with MCILS's stated interpretation of the rule. However, we identified multiple instances indicating a voucher was submitted billing for hours which included paralegal (or other non-counsel) time. This is important because that time, if approved, is paid at the attorney's hourly rate. While we do not know the extent to which this occurs, one attorney's perspective<sup>3</sup> indicated that the practice was common:

*In speaking with a myriad of other MCILS rostered attorneys who also employ paralegals, it is clear we track our paralegals' time in similar fashion as others doing this work do. The general consensus seems to be that paralegal time for tasks that attorneys normally do, but a paralegal actually does the work in their stead, is billed under the attorney working on the case. Without exception, the six attorneys I spoke with unequivocally stated the time is captured and submitted with MCILS vouchers.*

As a result of the agency's lack of policies and procedures and limited communication of (informal, unwritten) billing standards, MCILS-rostered attorneys may not have an awareness, or an understanding, of what is expected of them, or what expenses are covered and allowable. Thus, these attorneys may be billing MCILS incorrectly. Monitoring efforts to detect and correct instances of incorrect attorney billings fall on MCILS. However, as discussed on page 8/Issue 3, issues with existing monitoring efforts implemented by MCILS make detection difficult.

Additionally, OPEGA notes that the absence of policies and procedures to govern expenditures and payments may have the potential to financially impact those who have been deemed partially indigent. Because partially indigent clients are ordered to contribute to counsel costs (up to the voucher cap), incorrect billings may change the actual amount the client is obligated to pay. MCILS staff has agreed that this situation is possible, but noted that it was probably a rare occurrence. Further, MCILS staff told us that such a situation would be potentially difficult to reconcile, and that they have no mechanism in place to check and correct this, if it does occur.

- Formal policies and procedures should be established by MCILS management to better define allowable and covered expenses. These policies and procedures would clarify expectations for billing and invoicing practices that if proactively communicated, would improve the effectiveness of the system to approve expenditures and process payments to rostered attorneys and non-counsel service providers.

<sup>2</sup> MCILS does allow for some paralegal services to be reimbursed at their own, lower rate in murder cases, but this is subject to preapproval and is to be separately invoiced and not billed through Defender Data.

<sup>3</sup> Letter from rostered attorney to MCILS Executive Director.

**Issue 2. Data available to MCILS staff via Defender Data is unreliable and potentially misleading.**

With the lack of established and available policies and procedures to educate and guide attorneys towards compliance with MCILS’s desired timekeeping and attorney voucher submission practices, the responsibility for ensuring the accuracy of billing entries and identifying instances of noncompliance, rests almost entirely upon agency staff. MCILS’s Executive Director and Deputy Executive Director attempt to fulfill this responsibility primarily through their review of work events listed on attorney vouchers. During this review by agency staff, particular attention is paid to the duration of each event (such as phone conferences with clients, reviewing files, composing correspondence, etc.) and any notes associated with an event, or attached to the voucher generally, to explain the billed entries. Using the attorney voucher data OPEGA obtained, we reviewed these notes, as well as attorney responses to MCILS staff notifications (communicated via Defender Data system) that the attorney may have exceeded some limit or billed incorrectly. In this review, OPEGA noted multiple scenarios when the effectiveness and efficiency of MCILS’s current review system (which triggers the notifications to attorneys) is impeded because of the quality and accuracy of the data in the Defender Data system, which they rely upon. The quality and accuracy of the data are unreliable and potentially misleading. OPEGA found that entries made by attorneys into the Defender Data System:

**The quality and accuracy of the data impedes the effectiveness and efficiency of the agency’s current system of attorney voucher review.**

- captured or entered the hours of multiple attorneys under one attorney;
- batched multiple small work events into one large single-event entry;
- captured and entered work hours on the wrong date; and
- captured and entered the work hours of staff—particularly paralegals—under an attorney.

These scenarios all increase the amount of time recorded for a single, discrete entry. With the exception of incorrectly capturing and entering the work hours of staff (i.e. paralegal hours entered as attorney hours), the entirety of the aggregated time in these scenarios may reflect time appropriately spent on a case which would be otherwise allowable and billable to MCILS. However, due to the lack of consistency in how attorneys record time events and the prevalence of data entry errors, these scenarios may generate false-alarms requiring follow-up action from both MCILS staff and response from the billing attorney.

Additionally, the quality and accuracy of the data limits the potential effectiveness of any future, high-level, data analysis to potentially identify and flag outlying values. Such analysis may identify lengthy durations for particular work events, or days, or billings from one attorney that are inconsistent with those of attorneys performing similar work.

OPEGA also observed that when MCILS does identify and correct an incorrect value, only the voucher total is changed, leaving the incorrect value for the work event entry to remain in the data set. These incorrect values hinder the establishment of any baseline metrics, or standards, that could

be used to identify questionable attorney billings and any subsequent, overarching data analysis. Further, the incorrect values could also potentially hinder the use of more efficient techniques for review and audit by MCILS and by the Defender Data system itself. (See Issue 5).

It is important to note that these issues with the quality and accuracy of the data had an impact on the data analysis OPEGA performed for this review, and will ultimately limit our ability to identify specific attorneys for further audit work. (See page 21).

- The quality of available data in terms of consistency, accuracy, and reliability could be improved in several ways if the agency undertakes the following interrelated initiatives:
  - Establish and communicate expectations and guidance outlining how time events are to be recorded in Defender Data to improve the consistency of the data;
  - work with Justice Works to develop data-entry controls that reflect newly-established expectations and provide guidance to correct potential data issues, or errors, when they occur; and
  - correct data errors within Defender Data at the time they are identified to improve the reliability of the data when used for data analysis or risk-based auditing.

### **Issue 3. Current efforts to monitor attorney vouchers are inefficient and of limited effectiveness.**

There are multiple elements comprising the attorney voucher review process currently used by MCILS staff. Below, OPEGA identifies issues within those elements of the voucher review process which have the effect of limiting its overall efficiency and effectiveness.

#### Event-Level Voucher Review, Generally

Event-level voucher review has been described as representing a significant portion of both the MCILS Executive Director and Deputy Executive Director's daily work hours. This time-consuming effort purportedly involves manual review of all event-level entries on each attorney voucher (typically one per case). Event-level entries, typically reported in tenths of an hour, include things like: reviewing discovery; preparing email; and phone correspondence. Even accounting for the number of relatively simple vouchers submitted by attorneys billing for serving as lawyer of the day, or resource counsel<sup>4</sup>, (14.4% of total vouchers), event-level voucher review appears to be a significant amount of work. The average annual number of vouchers paid by the agency from FY10 through FY19 was just over 28,000, containing roughly 450,000 individual events to be reviewed.

**Event-level voucher entries are individual entries on a voucher reporting time spent by an attorney on a case-related activity (reviewing discovery, preparing email, phone conversation).**

<sup>4</sup> Mentoring, supervision and evaluation of private assigned counsel providing indigent legal services is described in further detail on page 28.

This large number of vouchers (and events) reviewed calls into question, both the amount of staff time available for this work and the thoroughness of the review conducted by staff. OPEGA analyzed the number of vouchers approved by a single staff member in a day over this period. We

**On almost 37% of the days in which a staff person was approving vouchers, they reviewed more than 100 vouchers – allowing less than 5 minutes to review each voucher.**

found that in 36.7% of the days in which a staff member was approving vouchers, over 100 vouchers were approved – allowing less than four minutes and forty-eight seconds to review each voucher<sup>5</sup>. Table 1 lists several ranges of approvals completed by a single approver in one day, from 100 or less to 601 or more,

and indicates how many times (days) approvals within each range occurred. Table 2 provides time per voucher reference points to better illustrate the time potentially available in a day for a single reviewer to review and approve various numbers of vouchers. Of particular interest were the eleven days from FY10 through FY19 in which an approver approved more than 400 vouchers in a day. Those occasions, however, as explained by the agency and preliminarily confirmed by OPEGA, were largely due to the availability of funds and do not accurately reflect time spent reviewing and approving those vouchers. On these occasions, the vouchers were reviewed and would have otherwise been approved and paid if funding were available at the time. Instead, the approved vouchers accumulated pending an appropriation and then later were approved simultaneously when the funds became available.

| <b>Table 1: Number of Vouchers Approved by Single Approver in a Day</b> |                       |                         |
|---|-----------------------|-------------------------|
| <b>Number of Vouchers Approved</b>                                      | <b>Number of Days</b> | <b>Percent of Total</b> |
| 601 or more   | 4                     | 0.1%                    |
| 501 to 600  | 5                     | 0.2%                    |
| 401 to 500  | 2                     | 0.1%                    |
| 301 to 400  | 15                    | 0.5%                    |
| 201 to 300  | 185                   | 5.6%                    |
| 101 to 200  | 1,010                 | 30.4%                   |
| 100 or less   | 2,103                 | 63.3%                   |
| Total   | 3,324                 | 100.0%                  |

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

| <b>Table 2: Single Approver Time Per Voucher Reference Points</b> |                          |
|---|--------------------------|
| <b>Number of Vouchers</b>   | <b>Time Per Voucher*</b> |
| 600   | 48s                      |
| 500   | 58s                      |
| 400   | 1m 12s                   |
| 300   | 1m 36s                   |
| 200   | 2m 24s                   |
| 100   | 4m 48s                   |

\*Assuming an entire, eight-hour, work day spent only reviewing and approving vouchers.

<sup>5</sup> Based on a full, eight-hour, work day spent only reviewing and approving vouchers.

### Defender Data Entries and Identifying Outlying Values

Despite the large number of vouchers and the significant staff burden associated with voucher review, neither the agency, nor the Defender Data system itself, appear to make effective use of technology for preventive controls against data entry errors. We noted that Defender Data will generate a flag alerting a billing attorney when an entry exceeds an established maximum voucher fee by case type (such as \$3,000 for Class A crime) and then prompt a potential correction and/or addition of a note prior to final submission of the attorney voucher. However, we observed no other data entry controls preventing, or limiting, the input of values (particularly durations of events). Although the agency has some informal maximums (.5 of an hour for opening a file) and some values that, if included on a voucher would be considered questionable, the Defender Data system is not being utilized as a control by rejecting those entries or generating a flag prompting staff to follow up.

Our analysis of data from 2010 - 2019 found nearly 110,000 outlying values<sup>6</sup> across eight selected types of timekeeping events (such as opening or closing a file) with some appearing far beyond reason (such as 30 hours to prepare an email or a 20-hour phone call with a client). Most of the identified outlying values (81.4%) were either:

- flagged by MCILS and later corrected by the attorney;
- explained in the system by a note added to the timekeeping event entry;
- explained in the system by a note or by one attached to the voucher; or
- addressed using a voucher override by the Executive Director or Deputy Executive Director.

Although ultimately addressed, these outliers necessitated a member of MCILS staff to review and question the entry and, as needed, follow-up with the billing attorney. Data entry controls in the Defender Data system, such as preventing the attorney from entering a value that exceeds a maximum fee, or generating a flag when a reasonable value is exceeded, could reduce the amount of staff resources required to address such issues.

### Monitoring High Annual and Daily Hours Worked

**MCILS staff's system of voucher review does not monitor cumulative annual hours recorded as worked by an attorney.**

In general, event-level review of each voucher does not provide MCILS with the information necessary to monitor cumulative annual hours worked by an attorney, and, until recently, did not allow for any monitoring of the daily hours worked by attorneys facilitating identification of rostered attorneys working potentially problematically high numbers of hours on a given day. Using the dataset OPEGA obtained directly from MCILS's billing service

<sup>6</sup> We defined outlying values as those that fell far from the median values for each type of event, and, more specifically, those exceeding boundaries calculated by finding the median, lower and upper quartile values, and interquartile range.



provider for our analysis in this review, we observed that instances of both high annual hours worked and high daily hours worked by attorneys occurred frequently in the time period reviewed, FY10 through FY19.

While 97.7% of attorney's annual fiscal year totals were below 2,080 work hours (40 hours a week for 52 weeks), there were 100 instances in which an attorney's annual total hours exceeded that threshold. Annual, fiscal year hours billed by attorney are stratified in Table 3. Table 4 provides average hours per week reference points to better illustrate the average time billed by attorneys.

| <b>Table 3: Annual Fiscal Year Hours Billed by Attorney (10 – year period)</b> |                                |                            |                         |
|--|--------------------------------|----------------------------|-------------------------|
| <b>Total Annual Hours</b>  | <b>Average hours per week*</b> | <b>Number of Attorneys</b> | <b>Percent of Total</b> |
| 1,040 or less  | 20 or less                     | 3,655                      | 82.7%                   |
| 1,041 to 2,080   | 20-40                          | 663                        | 15.0%                   |
| 2,081 to 2,600   | 40-50                          | 76                         | 1.7%                    |
| 2,601 to 3,120   | 50-60                          | 16                         | 0.4%                    |
| 3,121 or more  | More than 60                   | 8                          | 0.2%                    |
| Total  |                                | 4,418                      | 100.0%                  |

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.  
\*Assuming 52 weeks worked per year.

Particularly noteworthy were eight instances in which an attorney billed over 3,120 hours in a fiscal year. The totals and average number of hours billed per week for these eight highest instances are presented in Table 4.

| <b>Table 4: Attorneys Exceeding 3,120 Hours in Any Fiscal Year</b> |                      |                    |                                  |
|--|----------------------|--------------------|----------------------------------|
| <b>Fiscal Year</b>   | <b>Work Attorney</b> | <b>Total Hours</b> | <b>Calculated Hours per Week</b> |
| 2018   | Attorney A           | 4429.0             | 85.2                             |
| 2014   | Attorney B           | 3446.8             | 66.3                             |
| 2019   | Attorney C           | 3438.3             | 66.1                             |
| 2015   | Attorney D           | 3400.9             | 65.4                             |
| 2014   | Attorney D           | 3398.0             | 65.3                             |
| 2013   | Attorney B           | 3343.1             | 64.3                             |
| 2017   | Attorney E           | 3281.4             | 63.1                             |
| 2013   | Attorney F           | 3269.8             | 62.9                             |

Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.

In terms of daily hours billed, we identified 2,993 instances in which an attorney billed 16 or more hours in a single day. Most concerning were the 224 attorney and date combinations in which more

than 24 hours were billed in one day; these 224 instances ranged from 24.1 to 84.2 hours. Roughly 70% of these instances were recorded by six attorneys, as shown in Table 5.

| <b>Table 5: Attorneys with highest counts of billing more than 24-hour days</b> |                               |
|---|-------------------------------|
| <b>Work Attorney</b>  | <b>Count of 24+ Hour Days</b> |
| Attorney G  | 41                            |
| Attorney B  | 32                            |
| Attorney A  | 27                            |
| Attorney E  | 25                            |
| Attorney D  | 19                            |
| Attorney F  | 13                            |
| Source: OPEGA analysis of MCILS voucher data obtained from Justice Works.       |                               |

12-Hour Alert Notification System

During the time period that the 6AC evaluated MCILS, the agency conducted its own internal investigations of high billing by attorneys. The Executive Director reviewed the billings by attorneys with over \$150,000 in billings in any of the previous three fiscal years (FY16, FY17, FY18). [This investigation is described in detail on pages 18 through 20. Limitations with this investigation and other similar efforts are detailed in Issue 5.] Following this work, the Executive Director instituted a 12-hour alert notification system.

**The agency's 12-hour alert notification system is an ineffective control to address potential overbilling.**

Under this notification system, as attorneys submit vouchers for cases (generally upon conclusion of the case), Defender Data tracks the hours billed on a daily basis. When one or more submitted vouchers show an individual attorney billing more than 12 hours on a given day, the system generates an alert email that is sent to both the attorney and MCILS staff. These alerts are entered into and tracked using, what the agency refers to as its “High Daily Hours Tracking” spreadsheet.

OPEGA reviewed this spreadsheet and found this monitoring tool to be an ineffective control, and the process used to track alerts, to be inefficient for a number of reasons.

- The alert is generated independently of voucher approvals within Defender Data, which means that attorneys are paid as usual before the attorney responds to the notification, or even if the attorney never responds.
- The alert system creates a flag for, but does not correct, potential issues. The alert may be generated **years** after the date on which the 12-hour threshold was reached, because attorney vouchers are primarily submitted when a case concludes which could be months, or years, after the start of the case. We observed some 12-hour alerts dating back to 12/4/2017, which could prove difficult for attorneys and/or MCILS to accurately reconcile.

- The responsiveness by attorneys to the alert notifications was poor. Of the 1,285 rows in the High Daily Hours Tracking spreadsheet containing at least one day with a 12-hour alert, 70.6% (907) showed no attorney response<sup>7</sup>.
- The 12-hour threshold may be too low and not focused enough on true outliers or exceptions, as 12-hour days are not atypical for the profession. Of the 378 responses from attorneys in the spreadsheet, 131 (34.7%) indicated the hours were accurate - or the explanation provided by the attorney was accepted by the Executive Director. This process required follow-up and attention from both the attorney and MCILS. Common explanations offered by attorneys included the following:
  - The time was accurate, as attorneys either had lengthy days during the normal course of business or were trying to get caught up before, or after, a vacation or holiday.
  - The time was accurate, as the attorney was a rural practitioner which necessitates a lot of travel time.

Other frequently noted explanations do not appear to be consistent with agency rules or desired billing practices:

- More than one attorney's time was captured under one attorney's billing (the time worked was otherwise accurate).
- Additional staff hours—such as a paralegal's time—were billed as the attorney's hours (even though this appears to be inconsistent with policy – see pages. 5-6).

Another 70 (18.5%) of the 378 attorney responses indicated that the work was done, but entered on the wrong date.

- In terms of impact in dollars, the figure populating the “Amount Overbilled” column of the spreadsheet totals only about \$6,400. However, in terms of the value, or effectiveness of the 12-hour flag as control, we note that this number (\$6,400) is likely understated because in some cases attorneys can change the amount before the voucher is billed.

### Identification of Double Billing

Despite the general lack of relevant responses to the Executive Director's investigation into high billing attorneys and the agency's general lack of follow-up (issues with audit and investigation processes are noted in Issue 5), one attorney's responses were useful in illustrating how double billing can occur. Double billing is unlikely to be identified through MCILS's current attorney voucher review process, and, in this attorney's case, was not.

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<sup>7</sup> The Executive Director reported that while there are a large number of attorney non-responses, the number is lower than OPEGA's figure, as MCILS has not yet entered some attorney responses into the spreadsheet.

As illustrated in the following bulleted examples, double billing is any scenario in which MCILS is paying for the same time twice. Our review of the attorney responses to the Executive Director's investigation into high billing attorneys and the results of the attorney's self-audit revealed three such scenarios. It also revealed concerns related to the agency's ability to identify double billing relying on the current system of voucher level review:

**Double billing – more than one request by an attorney for payment for the same time – is unlikely to be identified through the current voucher-level review system.**

- Duplicate time entries—or the entering of the same work event more than once in Defender Data—can occur when more than one person (such as the attorney, office manager, and/or administrative assistant) all enter events into Defender Data, resulting in some overlap. For many work events, such as reviewing an email, or a phone call with a client, these instances are unlikely to be identified, flagged, and/or questioned by MCILS due to their routine nature. As observed by OPEGA in the attorney responses and the one attorney self-audit, only the attorney could accurately identify such instances.
- Overlapping time entries—or being paid for two different work events at the exact same time—can also occur under MCILS's current framework for the recording, billing, and approval for payment of attorney hours. Generally, attorneys submit a voucher containing all of the hours worked over the duration of a case at the conclusion of the case for MCILS approving payment. As work events are submitted at the voucher (or case) level—rather than an hourly accounting of time at the end of a day or week (like a traditional timecard)—it is difficult to identify when an attorney attributed the same exact hour(s) to two or more cases, and received payment for all. Reporting time at a voucher level either obscures or completely ignores the reality that attorneys may perform other, unrelated work events during lulls in other certain work events. Reporting this time accurately to avoid double billing requires adjustments to entries by attorneys, or their staff. For example, an attorney serving as lawyer of the day is paid for the entirety of their time spent at the courthouse with defendants, but during downtimes in the court throughout the day, the attorney may work on other indigent legal cases by emailing clients or reviewing case materials. Similarly, an attorney may be travelling for one client—which is billable time—but may be having phone conversations with other clients during that travel time, which is also a billable activity. If all of these events are recorded and entered without adjustment by either the attorney or attorney's staff, they will have been paid twice for their time. If the hours worked on a given day do not exceed 12 hours, the opportunity to observe these overlapping events and catch these occurrences will be very limited given the current system in place to record and bill for attorney hours and their subsequent review by MCILS for approval and payment.
- Over-allocation of time spent in court or travelling—or an attorney travelling to and being present in court for multiple cases, but billing the **entirety** (and not a portion) of that time to **each** of those cases—may be a less common occurrence than other examples of double billing. Regardless, these occurrences are at risk of being undetected by MCILS. In our review of attorney responses to MCILS, an over-allocation of time spent in court was

demonstrated by one particular attorney. In this instance, the attorney spent the day in court for multiple cases and sought to allocate their time by dividing the number of hours spent in court by the number of cases. However, some cases may be continued for a variety of reasons, and, as such, require only minutes of the attorney's time. In those cases, the attorney chose to not allocate the day's court time and removed them from the total cases for the day. For example, the attorney spent eight hours in court with 12 cases scheduled, but four were continued for various reasons. The attorney would then allocate their time to the eight remaining cases, resulting in one billable hour for each case. As explained in the attorney response, however, the attorney's staff would apply the hour per case to all 12 cases when entering vouchers in Defender Data. Thus, an eight-hour court day was turned into 12 billable hours. Again, while we have not confirmed the scope, or extent, to which this may occur, it appears as though if this scenario was known, it could be addressed in the near future—hence, its inclusion here.

### Achieving Cost Savings – Financial Stewardship

Lastly, over the course of its broader, attorney voucher review in Defender Data, the agency's efforts have resulted in relatively few instances in which MCILS staff has manually adjusted a voucher total in response to an identified issue. We found only 1.1% of vouchers had totals overridden by staff, which represented an even smaller percentage—0.3% of total voucher expenditures. From FY10 to FY19, annual savings directly resulting from MCILS voucher overrides averaged just under \$36,000—although this number does not capture voucher entries that are questioned by MCILS and later reduced by the submitting attorney. The average annual totals for voucher expenditures were roughly \$13.5 million during that time. To whatever extent vouchers are being reviewed by staff, the process appears to be of limited effectiveness—particularly when viewed in light of the financial impact/realized savings.

- Assuming improvements are made to the overall quality of MCILS's attorney voucher data, the agency should reevaluate its process for reviewing attorney vouchers with the objective of improving both effectiveness and efficiency. At a minimum, the following process attributes should be considered by MCILS in reevaluating and potentially redesigning its attorney voucher review process.
  - The process should identify, investigate and, as necessary, address the types of instances with the greatest potential impacts to financial stewardship and the quality of representation—high daily and annual hours worked by attorney.
  - The process should utilize technology to identify and correct potential data entry errors when they occur, such as flagging the input of values in excess of established limits, instead of relying on manual review of vouchers to identify potential errors.
  - The process should incorporate data and risk-based audit techniques to the greatest extent possible to potentially reduce the burden placed on the Executive Director and Deputy Executive Director by the manual review of vouchers—allowing them to focus on other important, but neglected, aspects of MCILS's purpose as discussed in Part III.

Additionally, we note that transitioning from a voucher-based payment system to a timecard-based payment system may address issues related to the timeliness and accuracy of daily hours worked. In the current voucher-based system, work events occur over the life of a case—which may last years—and are submitted at the conclusion of the case. Issues with billing errors may not be identified until well after the work events occur. Based on OPEGA’s review of the data, it appears easy for attorneys to lose track of how many hours they worked/billed on a given day under such circumstances. Processing payments using a timecard-based system would require attorneys to log their daily work events and submit them for approval on a regular basis (such as every two weeks). As such, data entry would occur closer to the actual work events, putting MCILS staff in a better position to identify when high daily work hours occur and allow attorneys to see any potential duplicate or otherwise incorrect entries which could be addressed at that time.

**Issue 4. Invoice-level review of non-counsel invoices may be of limited effectiveness in identifying certain types of noncompliance.**

Although total annual non-counsel service provider invoices are far smaller than attorney vouchers, both in terms of counts and total dollars, OPEGA explored areas of risk associated with this type of expenditure. Through this work, we found that neither MCILS’s process for the review and

**MCILS staff’s system of individual vendor invoice review (for non-counsel services) is unlikely to identify duplicate charges, high daily billing or duplicate invoices.**

approval of non-counsel invoices, nor the data generated from the entry of necessary information from these invoices into Advantage (the State’s accounting and vendor-payment system) for payment processing is effective in identifying certain types of non-compliance.

Non-counsel service provider invoices are first reviewed individually by MCILS’s Accounting Technician for compliance with established rates, reimbursement limits, agency pre-approvals, and the accuracy of invoice calculations prior to approval by the MCILS Executive Director. Upon approval, a limited amount of information from each invoice—essentially just the information required for processing and payment through Advantage—is entered into the system.

As MCILS reviews and processes each non-counsel invoice individually, staff are unlikely to identify potential billing issues that span more than one invoice. For example, a non-counsel service provider (such as a private investigator) may be working on multiple cases for multiple attorneys, and, accordingly, submit multiple invoices—none of which raise any issues when reviewed individually. However, when reviewed together, the invoices may reflect potential issues such as daily billed hours that are exceedingly high or exceed 24 hours in a given day. Similarly, the data contained within Advantage is limited to only what is required for the State’s accounting system. This data lacks key elements that would be critical to performing any vendor analysis across multiple invoices: detailed service descriptions, dates of those detailed services, who performed the detailed services, and for which case the services were provided. Together, MCILS’s review process and the data available via Advantage are of limited effectiveness in identifying instances of high-daily billing hours (a similar

concern to that of attorneys), duplicate charges (the same charge or service appearing on multiple invoices), or duplicate billings (the submission and payment of the same invoice more than once).

To best determine whether these scenarios are occurring, OPEGA accessed the available data from Advantage to develop a universe of invoices paid by MCILS. Although we were limited by the details of the data, we performed some high-level data analysis which enabled us to select a judgmental sample of 235 invoices (roughly 1.5% of the total paid invoices) to review for the concerns noted above (and others).

In our review of a series of invoices spanning just over three months from a frequently used vendor—which appears to be a sole proprietorship with no other employees—we observed billing for a high number of hours on several days across multiple invoices. These potential red-flags are presented in Table 6.

| <b>Table 6: Instances of billing for a high number of hours across multiple invoices by one vendor</b> |                               |                           |
|--|-------------------------------|---------------------------|
| <b>Date</b>  | <b>Number of Hours Billed</b> | <b>Number of Invoices</b> |
| 7/14/2017  | 19                            | 5                         |
| 7/17/2017  | 18                            | 6                         |
| 8/25/2017  | 19                            | 4                         |
| 9/4/2017   | 16                            | 4                         |
| Source: OPEGA analysis of MCILS vendor invoices obtained from Fortis.                                  |                               |                           |

It should be noted that MCILS did describe a one-time audit of private investigation services invoices that identified similar concerns related to high daily billing hours. Vendors were asked to provide contemporaneous time records for dates with high billing hours. An outcome of the audit was that one vendor did not provide sufficient records and is no longer approved for MCILS-paid private investigation services. Despite the fact that this one-time audit by the agency identified issues that merited such action to be taken, similar reviews such as the one conducted have not been formalized or become part of the agency’s regular review and monitoring of other non-counsel invoices. (See appendix D for additional results of OPEGA’s review of non-counsel invoices.)

- Development of a broader audit/review procedure for non-counsel invoices and periodic use of a risk-based method to select and review invoices would allow the agency to identify and correct instances of inappropriate high daily billings, duplicate charges, duplicate payments, and potentially, other instances of noncompliance.

**Issue 5. Defined policies and procedures for audit and investigation have not been established. Current methods used by MCILS are limited, inconsistent, and also of limited scope, depth and effectiveness.**

As previously noted, MCILS lacks established policies and procedures governing the processing of vouchers, invoices, and expenditures. Similarly, the agency lacks defined policies and procedures for conducting audits and investigations of attorneys.

However, OPEGA did review three instances we were made aware of in which MCILS staff conducted an audit or investigation:

- A one-time review of private investigation services invoices;
- a review of one attorney’s discovery materials to reconcile the volume of those materials with the hours billed for reviewing discovery; and
- an investigation into nine attorneys selected from the 6AC’s reported highest billing attorneys.

For the last investigation listed above, OPEGA was able to assess the agency’s procedures for audits and investigations which we describe as ad-hoc. We did this by accessing and reviewing the following materials:

- data provided by MCILS to the 6AC;
- data obtained by MCILS staff from its vendor and the subsequent data analysis they performed; and
- agency correspondence with two individual attorneys and correspondence to and from one firm (containing 3 of the 9 selected attorneys).

This investigation by the agency into the highest billing attorneys was limited to those 9 attorneys with over \$150,000 in billings in any of the three fiscal years (FY16, FY17, and FY18)<sup>8</sup>. OPEGA found the scope of this internal agency investigation too limited to effectively identify the extent to which the issues raised by the 6AC<sup>9</sup> were occurring. For reference, the 6AC’s evaluation covered all attorneys and spanned five years. OPEGA’s own work for this report covered all attorneys spanning a period ten years—the entirety of MCILS’s existence as an independent agency. The small data set used by MCILS limits the agency’s opportunities to identify—and most importantly, correct, potentially problematic caseloads and/or billing practices of attorneys.

As a result of the agency’s analysis on the high billing attorney data, the Executive Director wrote three letters: two to sole practitioners and one to a firm at which three of the high billing attorneys

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<sup>8</sup> Ten attorneys were originally selected, with one of the ten excluded from further work, as the MCILS Executive Director had previously agreed to allow the submission and payment of many outstanding bills in a recent year from that attorney.

<sup>9</sup> The 6AC Report issued the following finding in regards to billing practices: “Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.”



worked. The letter informed the recipients that they were among the system’s highest earners and provided the attorneys with their annual hours and high daily hours worked from the agency’s records for reference. The Executive Director’s letter also made the following request:

*Please forward copies of any contemporaneous time records that you maintained outside of the Defender Data system for each day where total billing exceeded 16 hours. In addition, please provide any explanation you may have for the unrealistic billing totals and note that voucher ID and event information is provided for each of these days for assistance in identifying data errors, if any.*

**Attorneys contacted as a result of an internal agency investigation into high billing provided various explanations – none of which were challenged by MCILS staff.**

We observed that the Executive Director received three very different responses that varied in the extent to which they responded to the original request. The following responses to that request from the attorneys are intentionally described at a rather high-level in order to

maintain confidentiality consistent with the manner in which MCILS treats investigative records:

Response 1:

- Respondent acknowledged billing errors related to dates billed, but did not believe bills were submitted for work that was not performed.
- Respondent stated steps were being taken to decrease the respondent’s caseload and to implement a better record keeping system.
- Respondent did not provide contemporaneous time records.

Response 2:

- Respondent stated steps were being taken to decrease the respondent’s caseload and to implement a better record keeping system.
- Respondent reported reviewing approximately 4,000 events (those provided by MCILS) and provided information (added a column to spreadsheet) to record correct event times. This respondent’s self-audit identified roughly \$35,000 in overbilling spanning a three-year period.
- Respondent provided the updated spreadsheets, but did not provide contemporaneous time records.

Response 3:

- Respondent acknowledged shortcomings with billing practices/record keeping.
- Respondent indicated that data provided by MCILS had been reviewed and that the respondent had identified some recurring issues:
  - large time entries being the aggregate time for several attorneys;
  - Defender Data defaulting to the assigned counsel on each billable entry, which requires a manual correction and leaves room for human error; and

- included paralegal time for time spent working with attorneys, clients, courts, families, and service providers.
- Respondent identified a small number of duplicate entries and payments.
- Respondent did not provide contemporaneous time records, but did offer to make available to the Executive Director, summary spreadsheets reconciling time records with the agency's data.

OPEGA notes that no one provided contemporaneous time records and that, in general, the responses would not allow MCILS staff to independently confirm many of the claims made. We did not see that agency staff took steps to perform field audits or otherwise verify or challenge any of the responses. Similarly, we did not see evidence that MCILS took steps to quantify the potential areas of noncompliance (billing for paralegal time and duplicate payments) described in Response 3 or recoup any payments.

**None of the attorneys included in the high billing investigation provided contemporaneous time records as requested by the Executive Director.**

Additionally, based on the one case where an attorney responded with self-identified overbilling, it is apparent that there is no established agency process for determining, confirming, and/or agreeing upon a repayment amount. Further, there appeared to be little effort made by the agency to collect the overpayments, although this may have been partly due to the lack of an established mechanism to recoup these funds. There may also be a question surrounding where any repaid funds would go to either MCILS's account or the State's General Fund. OPEGA notes that the attorney's self-identified overpayment amounts were finalized on February 8, 2019 and at the time of this review, no reimbursement, or a plan for reimbursement payments, has been made.

Overall, the agency's audit/investigative process appeared informal and inconsistently administered. The process relied almost exclusively upon one self-audit by, and unverified responses from, only a few attorneys which were of varying quality. This information governed the agency's decisions (made at the discretion of the Executive Director) to pursue some overpayments and to not pursue other potential areas of noncompliance and overpayment. Together, these elements resulted in audit efforts of limited scope, depth, and effectiveness. Although the agency's enforcement actions, such as removing an attorney from the MCILS roster, in response to this information may otherwise appear to be straightforward decisions, OPEGA notes a complicating factor. A decision to remove an attorney from the roster may be first and foremost governed by a need to ensure an adequate number of attorneys sufficient to represent clients – particularly in certain regions of the state.

- Establishment of a formal audit process would serve as a more effective control than the current methods used by the agency and would provide for consistency in enforcement efforts. A more effective process could include policies and procedures that would guide the agency regarding:
  - how and when audits are to be conducted;
  - the records to be maintained by attorneys (and other non-counsel service providers) for potential MCILS review;

- a means of determining, confirming, and/or settling disputed overpayment amounts;
- a mechanism to recoup overpayments;
- penalties (including dismissal from the MCILS roster) for noncompliance; and
- consistent enforcement of all MCILS rules.

### **Data issues impede further analysis**

At the outset of this review, OPEGA raised the possibility that our data analysis and follow-up work would allow us to separate instances of what appeared to be overbilling from actual overbilling. We anticipated this information could then be used to potentially identify likely overbilling attorneys for limited field audits of attorney billing and time records. Our work did reveal that the highest average weekly hours reported by the 6AC report and the media is much smaller than initially thought, yet the underlying issues and red flags remain. While we are unsure whether the desire for further work, or field audits, has decreased given awareness that the magnitude of the reported suspected overbilling was overstated, the selection of any attorneys for further work is problematic at this time due to underlying data issues.

Throughout our data analysis, we encountered numerous outlying event values that we later determined were false alarms based on the notes associated with those entries. The notes themselves indicated that attorneys and their staff were not always reporting time in discrete values by day and by attorney. This was a theme that extended throughout our review of MCILS's audit/investigative efforts revealing a significant level of inconsistency in the data entered into the billing system. In attorney responses to both MCILS Executive Director's high billing investigations and 12-hour alert notifications within the billing system, OPEGA observed that attorneys reported batching work events (such as aggregating the time spent on texts for the entirety of a case into one-time event on a single day) or combining the hours of multiple attorneys under one attorney on a single date. Working on this review clarified for us that the manner in which information is entered into Defender Data by attorneys, essentially serves the singular purpose of getting MCILS's approval and payment for the various events on a voucher. To achieve this purpose, the data does not necessarily need to be granular or subject to strict entry protocols. Consequently, the data does not allow for the type of broader analysis which would identify specific attorneys to review – those having potentially overbilled for payment of services – which was the kind of investigation OPEGA had originally envisioned.

Due to the data limitations noted here, an investigation into specific instances of potential overbilling would require labor-intensive field audits of event-level and records and possibly client files, in the possession of rostered attorneys. In consideration of the explanations provided to MCILS in the course of its own audit/investigative work, the relatively small number of identified overpayments, and the tremendous amount of resources required for field audits, the GOC and the Legislature may wish to consider foregoing this intense effort and to direct OPEGA to move forward with a focus on the potentially more-impactful work related to indigency determinations.

## Part III. MCILS Structure of Oversight

### Is the oversight structure of MCILS adequate?

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OPEGA was tasked with determining the adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose. We identified several interrelated issues that contribute to a structure which fails to provide adequate oversight of MCILS's operations - and of the Commission's statutory purpose to efficiently provide high-quality legal representation to indigent clients. The interrelated reasons for this inadequate oversight structure will require a holistic approach to remedy.

OPEGA found that the following appear to be the main contributors to the weakness of the oversight structure.

- **The agency charged with administering MCILS's purpose is under-staffed.**
- **MCILS staff operates without clearly-defined roles and uses current staff inefficiently.**
- **The Commission receives insufficient support for necessary operations.**
- **A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.**

The agency appears to have little organizational structure, as staff have no established job descriptions, or other formal guidance, outlining job functions and responsibilities. Had such a structure, with clearly defined roles and responsibilities and written guidance, been established early on in MCILS's development, staff efforts might have been more appropriately focused on effectively and efficiently performing the agency's primary functions. This structure would have also possibly enabled the Commission to identify the specific functions that were inadequately covered in the agency so as to make targeted requests for additional staff.

OPEGA sees the function of establishing and maintaining a sufficiently resourced agency to effectively and efficiently achieve the organization's statutory purpose as a fundamental responsibility of any government entity. Despite a long-standing awareness at the agency level and among the Commission that staff levels were insufficient, it did not result in requests or substantive advocacy for an increase in staffing for the agency. Further, given this understanding that staffing was a concern, it appears that there has been little focus by the agency, or by the Commission, to identify how the organization should be structured to achieve its purpose.

**Insufficient staff resources leave little opportunity for a focus on improvements to agency processes, systems, and broader structural issues.**

effectively and efficiently achieve the organization's statutory purpose as a fundamental responsibility of any government entity. Despite a long-standing awareness at the agency level and among the Commission that staff levels were insufficient, it did not result in requests or substantive advocacy for an increase in staffing for the agency. Further,

In order to provide some context to this report's discussion of MCILS's oversight structure, it is important to note that MCILS's purview in providing legal services to the indigent (and partially

indigent) in Maine is extensive. The system is currently made up of 368 rostered attorneys appearing in courts throughout Maine. In FY19, rostered attorneys opened 27,437 cases, totaling approximately \$17 million in attorney billing. In that year, MCILS processed and paid 32,575 attorney vouchers.

**Issue 6. The agency charged with administering MCILS purpose is under-staffed.**

OPEGA observed a lack of sufficient staff to adequately meet the full responsibilities of the agency. When we asked the Executive Director about review or improvements to specific agency operations, the Executive Director described that the current MCILS staff is the minimum necessary to allow the system to continue to function. Thus, there was little time available to consider new initiatives, or improvements, to wider substantive structural issues such as quality of representation, the lawyer-of-the-day program, or the use of single-source contracts to provide legal services. The Executive Director described that there was a general, ongoing awareness over the years amongst the Commission that the agency was short-staffed.

Although the agency's annual report is submitted to the Joint Standing Committee on Judiciary and the Governor in January of each year, the report does not appear to describe a staffing need (other than noting existing vacancies) or advocate for more staff. The report describes MCILS's office staffing as follows:

*The Commission's central office staff consists of the Executive Director, the Deputy Executive Director, and an Accounting Technician. A fourth administrative support position remained vacant during 2017 as the remainder of the central office staff, by utilizing technology and sharing basic administrative tasks, was able to operate with this position vacant. The Commission believes that the administrative support position should be filled. There was no job turnover among central office staff during 2017.*

Although MCILS staff vacancies are mentioned, OPEGA notes that the annual reports do not describe an urgent need for the vacancy to be filled, express a need for additional staff, or indicate what functions, or statutory requirements, are not being attended to as a result of insufficient staffing.

It was expressed to OPEGA that requests for additional staffing resources would not be looked on favorably due to the focus on meeting current operating costs and addressing agency budget shortfalls. Thus, despite the apparent staffing needs, MCILS did not advocate, or make formal requests to the Legislature, for additional staff in prior budget cycles until the most recent supplemental budget request in early 2020.

**Issue 7. MCILS staff operates without clearly-defined roles and uses current staff inefficiently.**

The absence of a clear and effective agency structure with defined roles, responsibilities and expectations, contributes to what OPEGA observed to be an inefficient use of existing staff.

In discussions with agency staff about their roles and responsibilities, it appeared to OPEGA that a substantial portion of management staff time was being spent on day-to-day operations, including a significant amount of administrative-level work. Below are some of the areas where OPEGA observed inefficient use of agency staff.

### Rostering

The Deputy Executive Director performs monthly updates of each attorney roster, which are divided by region and then further by practice specialty. This function requires keeping track of and responding to communications from attorneys who want to be removed from the roster or change case type assignments, and updating information such as when an attorney moves to another firm. The Executive Director and Deputy Executive Director advise attorneys on eligibility requirements, including whether to apply for a waiver on certain requirements. They also conduct analysis of geographic distribution of attorneys when an attorney requests a new court location. There is also a process requiring attorneys to renew their roster status annually. This is a paper-driven process, which is described as time-consuming by the agency's Deputy Executive Director. Though a portion, or certain elements, of this work may require a higher level of response by management, there does not appear to be any consideration of assigning roster-related tasks to administrative-level staff.

### Attorney Voucher Approval

As noted in Issue 3 on page 8, the Executive Director and Deputy Executive Director spend a substantial amount of time reviewing and approving individual attorney vouchers. Although reviewing expenditures and processing payments is a primary and critical MCILS function, the method of voucher-level review is neither effective nor efficient, as discussed in Issue 3 on pages 8-16. As this report has stated, OPEGA notes that a more targeted, risk-based approach would allow for management staff time to be used more efficiently and to better recognize the qualifications and experience level of the Executive Director and Deputy Executive Director. For initial review and basic processing of attorney vouchers, written instructions and guidance could be used to support employees with qualifications better matched with this primarily administrative function.

### 12-hour Notification Follow-up

An element of the recently established system intended to monitor for potential overbilling by attorneys – the 12-hour notification system– requires follow-up with an attorney whose voucher submission generated a flag in the Defender Data system. (See page 12.) Staff described this process as time-consuming, requiring reaching out to individual attorneys and manually recording the information collected as part of the follow-up effort.

**Agency management’s focus on day-to-day administrative duties impacts the capacity to provide policy support and strategic direction to the Commission.**

OPEGA considers it to be an inefficient use of staffing resources to have management level positions undertaking administrative level work. Whether the Commission, as the oversight body for the agency, shares this view about the mismatch between staff qualifications and the functions they perform is unclear. It does not appear to OPEGA that this has been an area of focus of the Commission and, given the absence of MCILS staff job descriptions (or any written description of roles, expectations and tasks), it would be difficult for the Commission to provide oversight as to whether the current staff are undertaking an appropriate level of activities or are sufficiently focused on mutually understood priorities. The Executive Director reported having not had any formal performance evaluations. An apparent consequence of management positions being focused on day-to-day functions, is that there is no remaining capacity to provide appropriate policy support and strategic direction to the Commission, which would guide the agency in meeting its purpose and also allow for oversight of the agency’s operational structure.

**Issue 8. The Commission receives insufficient support for necessary operations.**

OPEGA observed inconsistency in expectations between the Commission and the Executive Director as to who should be assuming the initiative for providing policy direction and engaging in strategic planning.

Statute sets out specific requirements on the Commission (4 MRSA §1804) and the Executive Director (4 MRSA §§1805 and 1805-A). Many of these requirements relate to the original establishment of the Commission, setting out what the Legislature considered to be necessary for the newly established entity to commence operations. Other than statute, there is no written expectation of the Commission’s role and new Commissioners are not provided with any sort of training to orient them to their functional role. Similarly, other than statute, there is no written expectation of the Executive Director (or other staff) in the form of a job description – something we’ve noted previously in this report.

OPEGA observed a lack of clarity between the Commission and the Executive Director about whose responsibility it is to drive the strategic and policy direction of the agency and Commission. For example, OPEGA observed differing perspectives on whether the Commission is largely responsible for rule making and budgets or for wide-ranging oversight of the provision of indigent legal services across the state, including oversight of the work of the agency. This lack of clarity and mutual understanding regarding roles, responsibilities and expectations between the Commission and the Executive Director creates a risk to MCILS, and to the State, of insufficient accountability for the provision of indigent legal services in the State.

**The lack of mutual understanding between the Commission and the Executive Director regarding responsibilities and expectations creates a risk of insufficient accountability for the provision of indigent legal services.**

OPEGA cites the following examples to illustrate how the lack of clearly defined roles and mutual understanding of responsibilities impacts what information is provided to the Commission and therefore impacts the Commission's ability to provide robust oversight.

### Information Provided to the Commission

For any Commission, or similar body, to effectively exercise oversight of an administering agency and to make key strategic and policy decisions towards the Commission's objectives, a consistent flow of useful and appropriate information is necessary. For MCILS, statute sets minimum requirements for information and documents to be provided to the Commission on a monthly and annual basis (4 MRSA §1805(7)). It appears to OPEGA, that this minimum standard is met. However, although technically sufficient to comply with statute, it appears to OPEGA that the Commission requires additional information to be able to provide effective oversight and decision-making focused on the purpose of MCILS. For example, although the Executive Director provides information to the Commission when requested, the Commission does not always appear to know what information it should request.

Previously we noted the lack of mutual understanding regarding responsibilities (among the Commission or the Executive Director) which continued to be apparent as we looked at the substance, format and content of information or materials provided to the Commission. OPEGA observed that it is not clear as to who is responsible for identifying issues and determining what information should be distributed, or the type and level of information that should be routinely provided, to the Commission to ensure effective oversight.

- **Financial information:** A primary feature of each Commission meeting agenda is the monthly Operations Report from the Executive Director. This includes summary data, including the number of new cases opened, number and value of vouchers submitted and paid, average price per voucher, number of paid vouchers exceeding \$5,000 (accompanied by a case summary), number of complaints about attorneys and a very brief summary, number of requests for co-counsel with a very brief summary, and budget account balances. Some of this information is specified by statute to be provided to the Commission and other information was requested by the Commission in previous years - such as vouchers exceeding \$5,000 and information about complaints.

Having reviewed a selection of Operations Reports and conducting interviews with the current and former Commission Chairs, OPEGA observed that what is typically provided in these reports does not appear to furnish the Commission with useful material to provide meaningful oversight or to make decisions based on the information given. Our review of Commission meeting minutes showed no evidence of decision-making as a result of the monthly



Operations Report data. The summary-level data in the reports, while providing an overview, does not appear to assist in identifying issues or concerns for the Commission.

- **12-hour daily billing flags:** Following the release of the 6AC report and the agency’s internal investigation on potential attorney overbilling, MCILS implemented an alert system that is triggered if an attorney enters daily billing that exceeds 12 hours for the day, as described on page 12. This was implemented towards the end of the tenure of the last cohort of Commissioners, at a period of transition. OPEGA notes from the Commission meeting minutes in May 2019, that the Executive Director updated the Commission to note that the Commission’s request to reduce the daily hours alert to be triggered at 12 hours (rather than 16 hours) per day. Thereafter, as of the time of OPEGA’s review of meeting minutes through January 2020, it does not appear as though the Commission was given any formal briefings, or feedback, on how the system was working and what MCILS staff were learning about attorney billing. As this was a new system put in place to address a highly publicized concern around attorney over-billing, OPEGA would expect to see some mechanism to provide information to the Commission allowing it to provide oversight and assess whether the system is working as intended. OPEGA does note, however, that despite no formal information being presented to the Commission, the Commission’s financial responsibility sub-committee, established in December 2019, began looking into the detail of this alert system.
- **Resource Counsel program:** The Resource Counsel program provides another example of an area where there is a lack of clarity about the role and responsibilities for identifying issues, documents and information that should be considered by the Commission – and where the information provided to the Commission may not be adequate for the Commission to execute proper oversight of the program.

The Resource Counsel program was established by the Commission in June 2018 for the purpose of (according to the enacting document) providing “*mentoring, supervision and evaluation of private assigned counsel providing indigent legal services.*” The enacting document noted that as the program was launched, mentoring would be the primary focus and, as the Commission gains experience with the program, it may be expanded to provide periodic supervision and evaluation of attorneys.

It appears that as a mentoring program, it has the effect of being optional, as MCILS does not undertake any monitoring, or enforcement of new attorneys, to meet with Resource Counsel. The enacting document notes that the mentoring component requires Resource Counsel to meet with newly rostered attorneys three times within their first 6 months. OPEGA did not conduct a comprehensive evaluation of this program; however, we did hear some participant perspectives. An attorney assigned as Resource Counsel reported to OPEGA that although newly licensed attorneys on the MCILS roster are required to meet with Resource Counsel three times during the early period of their practice, the program had yet to have a new attorney follow through with these requirements. This Resource Counsel attorney added that

newly-licensed attorneys were being added to rosters and appointed to cases before the first required meeting had taken place.

This accords with what the Executive Director described to OPEGA - although new attorneys are informed by email that they are expected to meet with the Resource Counsel, there is no systematic follow-up of whether the requirement is met. The Executive Director noted that he hoped that the mechanism for the Resource Counsel to bill for their hours (capped at 10 hours per month) would provide MCILS with this information, but they found that not all Resource Counsel attorneys were billing for all their work, so it was not an effective feedback loop. It does not appear as though any action was taken to resolve this information gap.

The Resource Counsel policy notes that six months after the adoption of the policy, *“Commission Staff will report to the Commission on the operation of the Resource Counsel system.”* As the document was adopted in June 2018, the program would have been due for review in December 2018. OPEGA is aware that there was a brief note submitted to the Commission at their October 2018 meeting

**The Commission has received no substantive information about the Resource Counsel program established in 2018 to provide mentoring, supervision and evaluation of rostered attorneys, or an assessment of the program as required by its implementing document.**

in which MCILS noted that it had started receiving and paying Resource Counsel vouchers and that several Resource Counsel attorneys had brought issues related to attorney performance to the staff’s attention seeking guidance. There did not appear to be any more detailed or comprehensive report or review of the system at subsequent meetings. The Executive Director acknowledged to OPEGA that, other than discussion in passing, there is no formal information that goes to the Commission about the program and there has not been a review of the system as required in the implementing document. OPEGA understands that the Resource Counsel policy document has not been provided to the current Commission, as of the time of OPEGA’s review of meeting minutes through January 2020.

MCILS does not appear to have taken steps to gather adequate information to assess the program. In turn, no information has been provided to the Commission to allow it to assess whether the program is meeting its intended purpose.

**Issue 9. A weak oversight structure impacts the ability of MCILS to adequately meet its statutory purpose.**

The lack of a strong oversight structure and insufficient staffing has resulted in impacts to MCILS’s statutory purpose. Statute provides that MCILS is “an independent commission whose purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations” (4 MRSA §1801). OPEGA finds that the oversight of the operations in place for MCILS is inadequate to meet this stated purpose. OPEGA finds that the same is true for

other separately listed statutory requirements, beyond MCILS's stated purpose, which we also discuss in this section.

### Quality Representation

It is central to the purpose of MCILS that “high-quality representation” is provided to indigent (and partially indigent) clients in the State. However, MCILS has no mechanism to measure attorney

**Despite identification by external evaluations as early as 2017 that MCILS does not provide systemic oversight and evaluation of attorneys, effective mechanisms to do so have not been implemented.**

performance against practice standards or any other mechanism in place to formally measure, assess or oversee the quality of representation. OPEGA notes that we did not assess the extent to which attorneys are providing high quality representation – we looked at the extent to which the Commission and the Executive Director provide oversight of quality representation.

Issues related to a lack of oversight of quality representation were raised by both the 2017 Working Group and the 6AC. The 2017 Working Group noted that “the current program does not have systematic oversight and evaluation of attorneys<sup>10</sup>”. The 6AC report noted that as there are no systems or capacity to provide oversight, it is difficult to know the extent of any potential problems with the quality of representation<sup>11</sup>. Despite these issues having been identified by external bodies, no formal evaluation mechanism has been put in place. The Executive Director described not having the staff available to monitor lawyers or review files. However, as noted above, prior to the most recent supplemental budget request, no requests have been made for additional staff.

MCILS described some informal mechanisms it uses to attempt to monitor quality. However, OPEGA sees these as insufficient to ensure high-quality representation. The mechanisms primarily included the Resource Counsel program and what might potentially be gleaned by the Executive Director and Deputy Executive Director as they conduct voucher reviews.

- **Resource Counsel:** MCILS described the Resource Counsel program, which was implemented in June 2018, as an attempt to monitor and evaluate quality. However, as we have noted, the program has not been reviewed as required by the implementing document, actions have not been taken to seek to extend it to supervision and monitoring of attorneys, and there is currently no monitoring or enforcement of the mentoring meeting requirements on new attorneys. Additionally, there has been no systematic collection feedback on issues raised through this system communicated up to the Commission for it to provide oversight.
- **Voucher review as a quality review:** The MCILS Executive Director described getting an impression of attorney quality by reviewing individual attorney vouchers for payment, because the reviewer is able to see actions taken (such as client meetings) and the case outcome. The Executive Director described attorney voucher review as a useful and

<sup>10</sup> 2017 Working Group report, page 1.

<sup>11</sup> Sixth Amendment Center report, pages 57-62.

meaningful quality review procedure. Though vouchers provide some level of review, OPEGA does not consider this to be an adequate measure of attorney quality. The review involves reviewing the time and activities billed, but as discussed on pages 10-11, there is no mechanism to confirm whether the activities billed in fact took place. Additionally, the process of voucher review does not include a systematic evaluation against the standards, nor is any information related to quality as gleaned from voucher review communicated up to the Commission for it to provide oversight.

- **Additional area of risk:** OPEGA also noted other areas of risk, including that MCILS does not have any formal mechanism to consider availability and quality of attorneys on a regional basis (other than a general awareness by Commission staff of the number and identity of attorneys in each region and thus there is no Commission oversight, or systematic consideration, of potential regional availability or quality issues. OPEGA did not conduct any regional quality assessment of attorney availability or distribution, but did hear anecdotal evidence from multiple sources raising concerns around availability of a sufficient number of quality attorneys in a number of rural counties. OPEGA notes that regional availability issues can impact cost effectiveness, as it requires engaging attorneys out of the area and paying increased travel costs.

The absence of formal, systematic mechanisms to monitor or evaluate attorney performance (and therefore no mechanism for the Commission to provide oversight) creates a risk that at least one primary purpose of MCILS as prescribed by statute - providing high quality representation - is not being met.

### Screening for Indigence

MCILS's statutory purpose refers to the provision of legal services to indigent individuals. Different states have different policies, or mechanisms, to assess indigence. Maine has elected to use financial screeners, who are present in some (but not all) courts to interview individuals and gather information about income, assets and expenditures and to prepare a recommendation for judicial determination.

Where there is a financial screener, the screener meets with a client to collect information that is used to prepare a recommendation to the judge based on the client's reported income, assets and expenses, taking account of the MCILS Indigence Guidelines, which are a component of the MCILS rules. The judge is responsible for determining whether a defendant has sufficient means to employ counsel, based on listed factors, including income, credit, assets, living expenses, dependents, outstanding obligations and the cost of retaining services of competent counsel. If the judge determines that the defendant has sufficient means to pay a portion of the cost, counsel is assigned, but that assignment would be accompanied by an order to pay a portion of the costs.

For the purposes of this phase of the report, OPEGA only considered the financial screening function to the extent to which it is relevant to evaluating the overall oversight structure. Further examination of the screening function may be explored in the next phase of OPEGA's work for the

subsequent report. We note that a proposed amendment to LD 182 would, if passed, transfer the financial screening function from MCILS to the Judicial Branch. At the time of publication of this report, LD 182 was carried over to any Special Session of the 129<sup>th</sup> Legislature. Regardless of where the financial screening function resides, OPEGA would expect to see oversight of screening, including a shared understanding of the purpose, effectiveness and cost-effectiveness, and consistency of guidance and approach throughout the state. Although OPEGA did not, in this phase, conduct a full review of the screening function, we can make some observations based on our review of the relevant rules and guidelines, and based on interviews with MCILS stakeholders, including screeners, lawyers, and judges. These observations indicate a general lack of oversight attention paid to this function.

- **Inconsistent understanding of role:** OPEGA noted that there was an inconsistent perspective among those we interviewed about the purpose of the financial screening function – some considered that the purpose was to provide information to assist the judiciary in making its determination of indigence, but others considered that the primary purpose of the role is to collect as much money as possible from partially indigent clients.
- **Indigence Guidelines should be reviewed:** OPEGA notes that the Indigence Guidelines do not take into account the judicial requirement to consider the cost of retaining the services of competent counsel. Although the detailed work around consistency of indigence determination is part of the second phase of this evaluation, OPEGA did hear about inconsistencies in practice between screeners. OPEGA notes that the guidelines do not include any practical guidance on recommendations of partial indigence and that there is no current plan to review the guidelines.
- **Location and number of screeners:** OPEGA notes that screeners do not appear in every court, and this can have wider impacts. OPEGA heard that this may increase the time spent by judges in assessing screening information, and/or may impact the likely accuracy of the information provided directly by defendants, and/or may result in the Lawyer of the Day spending some time assisting clients completing screening forms.
- **Collections:** Collections from those determined partially indigent happen either by way of periodic payments directly from the client, by allocation of bail money, or by tax offsets (whereby the Maine Revenue Service withholds funds from tax returns if there are missed scheduled payments). OPEGA notes that there are no rules, or written guidance, that sets out information about collection mechanisms. The Commission does receive monthly totals of the amounts collected, but there is no information on regional variations to assess potential consistency issues. The Executive Director noted that MCILS may not have accurate regional collection information available, which raises questions about the mechanism to monitor and track relevant information. MCILS informed OPEGA that in courts where there is no screener, MCILS takes no action to follow-up on orders of partial indigence by tracking

monthly payments or tax-offsets, and this potentially creates regional inconsistency about how orders for partial indigence are enforced.

According to the Executive Director, MCILS processes about 2-6 overpayments by clients per month. As explained in more detail on page 6, issues around amounts that a client is due to pay may be impacted if attorney voucher amounts are inaccurate.

Increasing the number of screeners to provide them at each court location and adding a requirement that indigent or partially indigent clients be re-screened throughout the course of a case would require further analysis of staffing needs and cost effectiveness, as well as consultation with the Judicial Branch. OPEGA notes that the concerns we've raised here related to the screening function as part of the overall program of providing legal representation to indigent and partially indigent clients warrant further consideration and consultation. The absence of oversight of the screening function creates a risk of inefficiency, ineffectiveness and inconsistency potentially impacting indigent and partially indigent clients.

Meeting Statutory Obligations

**Although required by statute since 2009, MCILS has not established standards for conflict of interest and counsel caseloads.**

OPEGA observed that there has been insufficient oversight by MCILS to ensure that all statutory requirements are met. Maine statute requires the Commission to develop standards governing the delivery of legal services to indigent clients, to include specified matters listed below. These standards have not been developed and it does not appear to OPEGA that there are imminent plans to

resolve non-compliance with these statutory requirements (either by meeting the requirements or advancing a proposal to amend statute):

- standards for counsel caseloads (4 MRSA §1804(2)(C));
- standards for the evaluation of counsel (4 MRSA §1804(2)(D));
- standards for independent, quality and efficient representation of clients whose cases present conflicts of interest (4 MRSA §1804(2)(E)); and
- procedures for handling complaints about the performance of counsel providing indigent legal services (4 MRSA §1804(3)(M)).

The requirements for case load and conflicts of interest standards were enacted by PL 2009, c. 419 and therefore have been in place for over a decade. The requirements for standards for the evaluation of counsel and requiring a complaint procedure were enacted more recently by PL 2017, c. 284. OPEGA acknowledges that there appears to be an unwritten, informal procedure in place where complaints are investigated and outcomes determined by the Executive Director. However, there is no written policy, procedure or criteria in place that sets out how complaints should be investigated or determined. Presumably, the establishment of such standards is intended not only to guide the agency (and the Commission) in processing and resolving complaints in a fair

and consistent manner, but also to inform the person making the complaint and the subject of the complaint about what to expect from the process.

Although the Commission is directed by statute to develop these standards and procedures, as staff, the Executive Director is required by statute to:

- ensure that the provision of indigent legal services complies with all constitutional, statutory and ethical standards (4 MRSA §1805(1));
- assist the Commission in developing standards for the delivery of adequate indigent legal services (4 MRSA §1805(2)); and
- coordinate the development and implementation of rules, policies, procedures, regulations and standards adopted by the Commission (4 MRSA §1805(8)).

OPEGA has noted multiple times in this report that, overall, we found MCILS lacks adequate standard operating procedures and formal written policies to govern its primary functions. Similarly, OPEGA has found that even when standards are required to be established specifically in statute, MCILS relies on informal methods or does not address the standard at all.

Effectiveness and Efficiency of Financial Procedures

The lack of a robust oversight structure contributes to inadequate monitoring of the effectiveness and efficiency of financial procedures used by the agency. As described in pages 9-17, the procedures used by MCILS staff to monitor payments and expenditures associated with providing legal representation to indigent and partially indigent clients are inadequate. A robust oversight structure would be guided by a plan that clearly defines prioritized functions designed to meet MCILS’s statutory purposes and obligations effectively and efficiently. As noted in this review, the agency operates without written job descriptions, only informal guidelines and with a lack of clarity regarding the roles and responsibilities of staff as well as those of the Commission.

**Reports of summary data regarding expenditures provides no information about financial processes and systems used by the agency and does not appear to inform decisions or actions of the Commission.**

Summary data regarding expenditures provided at monthly meetings does not provide the Commission with an understanding of the financial processes employed by the agency the Commission is charged to oversee and how those processes are working. Additionally, this summary data does not appear to be used to inform decisions or actions of the Commission. An

understanding of the policies and procedures governing the agency’s financial operations could serve as a framework for Commission oversight of these functions – but as noted in this report, such written policies and procedures do not exist. Adequate oversight goes beyond simply having knowledge of the number of vouchers submitted and the amounts paid - it requires an understanding of the processes used to administer those payments and the specific controls in place to ensure they are made appropriately. Although the process used to review expenditures and submit payment for vouchers comprises a majority of the agency’s working hours, the Commission

appears to have dedicated little time to understand those processes and evaluate their effectiveness and efficiency.

➤ **Addressing the interrelated issues contributing to MCILS weak oversight structure will require a holistic approach.**

This report identifies several issues which are interrelated in their contribution to MCILS's inadequate structure for oversight of its operations and statutory purpose. The establishment of a robust oversight structure for MCILS should begin with the development of a formal, strategic plan with a framework driven by and addressing each of the elements contained within MCILS's statutory purpose—to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases, consistent with federal and state constitutional and statutory obligations. A focus on this purpose should result in a plan which would include clearly expressed priorities, articulated objectives for all of the processes and systems established to achieve those priorities, and well-defined roles and responsibilities for MCILS staff and the Commission itself. Adherence to a well-designed strategic plan could facilitate a structure for MCILS oversight and operations that is proactive in addressing issues of efficiency, effectiveness and potential misconduct—as opposed to the current posture of the structure, which is more reactive and shortsighted. Existence of this formal guiding document would provide the necessary foundation upon which the operations of the agency are designed, as well as, the benchmarks against which those operations can be measured and monitored by the Commission – and ultimately support effective oversight to ensure that MCILS's obligation to the People of the State of Maine is being met.



## Appendix A

### Project Direction Statement

#### **Project direction statement: Maine Commission on Indigent Legal Services**

**Presented by OPEGA to the Government Oversight Committee - 129<sup>th</sup> Maine Legislature**

**December 10, 2019**

#### **Purpose of a project direction statement in the course of a full review**

After the Government Oversight Committee (GOC) added a review of financial oversight and economic use of resources related to the Maine Commission on Indigent Legal Services (MCILS) to the Approved Project List, OPEGA assigned a team of Analysts to conduct preliminary research. The preliminary research stage of the evaluation process provides the team with a broad, but comprehensive understanding of the program. Once preliminary research is complete, the team reviews themes that have emerged and identifies areas that may be of future concern to the program. This work results in a proposed project direction statement for the GOC to consider. The statement suggests a framework that will guide OPEGA in the next phase of the evaluation process, fieldwork. This document represents that work and is respectfully presented for the GOC's consideration.

OPEGA recommends that the GOC direct a full evaluation of MCILS specifically related to financial oversight and the economic use of resources, and within the scope described in this statement.

#### **Overview of MCILS**

##### Establishment of MCILS and Organizational Structure

MCILS is a Commission that was established in 2009. The Commission is currently made up of nine members and is supported by an office staff of 4 who conduct the day-to-day operations. Its statutory purpose is to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants, and children and families in child protective cases. This representation is provided in accordance with requirements established in statute and both the federal and state constitutions. Maine statute specifies that the Commission shall work to ensure the delivery of indigent legal services by qualified and competent counsel in a manner that is fair and consistent throughout the state and to ensure adequate funding of a statewide system of indigent legal services, which must be provided and managed in a fiscally responsible manner. MCILS assumed responsibility for providing indigent legal services on July 1, 2010. Prior to MCILS, indigent legal services were arranged and funded by the Judicial Branch.

An amendment to statute in 2018 increased the number of members appointed to serve on the Commission from five to nine. The membership must include one member with experience in administration and finance, one member with experience in child protection proceedings, and two members (non-voting) who are attorneys providing indigent legal services.

MCILS staff includes an Executive Director, Deputy Executive Director, Accounting Technician, and an Office Associate, working in an office in Augusta; eight financial screening staff, who work at various courthouses across the state; and one investigator, who works part-time remotely.

#### Determination as indigent or partially indigent

In Maine, services for those who have been determined indigent, or partially indigent, are provided by attorneys in private practice. The Court assigns representation to a person by selecting an attorney from a roster maintained by MCILS. In order to be listed on the roster, attorneys must meet certain requirements. If they provide specific types of services, or have a defense specialty, they are listed on specific rosters accordingly.

A client's status as indigent or partially indigent is determined by a judge based on financial information provided by the person requiring representation. In some courts, a financial screener may be available. The screener interviews the client, gathers financial information, including the client's assets, income and expenses and makes a recommendation to the judge based on this information. The judge can deny representation at the public expense or make a determination that the person is indigent or partially indigent. A person determined partially indigent is ordered to make payments toward the assigned attorney's fees.

#### Attorney payments

MCILS is responsible for paying counsel fees and expenses to attorneys who have been assigned to indigent or partially indigent clients. Attorneys submit a voucher to MCILS through the electronic case management program, Defender Data. The MCILS Director and Deputy Executive Director review vouchers and approve attorney payments. Services provided by vendors hired by the attorney such as investigators, interpreters, and medical and psychological experts require advance notice and approval by MCILS. The vendor sends an invoice for the services provided to the attorney which is then submitted to and processed by MCILS who makes payment to the vendor.

Until June 30, 2019, one fixed fee contract existed to facilitate providing representation in Somerset County. MCILS contracted with three private attorneys to provide indigent legal services, paying the attorneys a fixed monthly rate. Additionally, the attorneys were reimbursed for case related expenses, such as investigators and expert witnesses. At this time, MCILS has no contracted attorney services.

#### MCILS General Fund budget

The Legislature appropriated approximately \$17.7 million for MCILS in FY20, and \$17.6 for FY21.

#### **GOC decision to consider review of MCILS**

During the 128th legislative session, OPEGA received a request for a review of MCILS from a GOC member with concerns related to the application of financial eligibility requirements for Court-appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a

portion of counsel fees. On February 17, 2017, the GOC voted unanimously to place the MCILS review request on OPEGA's Standby List.

### The 2017 Working Group

While this topic was on the Standby List, the 128th Legislature created the Working Group to Improve the Provision of Indigent Legal Services (the Working Group) as part of the biennial budget. The purpose of the Working Group was to develop recommendations to improve the delivery of indigent legal services to eligible people by focusing on:

- ensuring adequate representation;
- increasing the efficiency in delivering legal services;
- verifying eligibility throughout representation; and
- reducing costs while still fully honoring the constitutional and statutory obligations to provide representation.

In December 2017, the Working Group issued its report containing nine recommendations— the following four are related to the current scope of this request.

- Recommendation 2: Enhance the MCILS staff to provide better financial accountability and quality assurance by establishing specific responsibilities for a Chief Financial Officer and a Training and Quality Control Director.
- Recommendation 4: Strengthen the financial eligibility screening procedure.
- Recommendation 5: Remove the collections function from the MCILS and have the Judiciary Committee explore alternative methods of collecting from those recipients of legal services who have been ordered by the Court to contribute to the costs of those services.
- Recommendation 7: Commission an outside, independent, nonpartisan study of Maine's current system of providing indigent legal services and whether alternative methods of delivery would increase quality and efficiency.

### Sixth Amendment Center report

Recommendation 7 directly led to a report from the Sixth Amendment Center evaluating the services provided by MCILS. Issued April 2019, this report contained eight findings and seven recommendations— the following, from that report, relate to the current scope of this request.

- Finding 8: A significant number of attorneys bill in excess of eight hours per day, five days per week, for 52 weeks per year. MCILS does not exert adequate financial oversight of private attorneys.
- Recommendation 4: MCILS should use its current statutory power to promulgate more rigorous attorney qualification, recertification, training, supervision, and workload standards. The State of Maine should statutorily require financial oversight by requiring that MCILS limit the number of permissible billable hours, subject to waiver only upon a finding of need for additional capacity. The State of Maine should fund MCILS at a level to ensure rigorous training and effective substantive and financial oversight of attorneys.

While the Sixth Amendment Center report was being finalized, a GOC member brought forward a request for a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services.

On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

### **Preliminary research conducted by OPEGA**

During the preliminary research phase OPEGA:

- sought input from GOC members and Judiciary Committee members and staff on their questions and concerns regarding MCILS;
- reviewed statute, legislative history, rules and guidance related to MCILS;
- interviewed the State Auditor to understand any identified areas of concern;
- interviewed the MCILS Executive Director, Deputy Executive Director, Accounting Technician, a selection of screeners, and the screener/investigator;
- interviewed the Chief Justice and a selection of Judges;
- interviewed a selection of MCILS rostered attorneys working in different areas of law;
- reviewed the data provided to the Sixth Amendment Center on voucher payments based on assigned attorney;
- reviewed data on work performed over three years by nine attorneys and considered correspondence related to MCILS's investigation into high earning attorneys;
- considered the Sixth Amendment Center report "The Right to Counsel in Maine" (April 2019) and interviewed the Executive Director;
- considered the report of the Legislative Working Group to Improve the Provision of Indigent Legal Services (December 2017);
- reviewed a State Controller's report on MCILS's case management system; and
- reviewed reports regarding the provision of indigent legal services in other states.

### **Evaluation scope**

OPEGA examined the various themes that emerged from preliminary research and identified the following areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.

1. Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
2. Reasonableness of and consistency in the application of standards, criteria and procedures which inform the determination of whether a defendant/client is indigent.
3. Reasonableness of and consistency in the application of criteria and procedures used in determining, ordering and monitoring payments towards counsel fees by those who have been determined to be partially indigent.

4. Sufficiency of response by MCILS, or MCILS staff, to internally identified concerns and to recommendations made in reports which examined or evaluated the operations of the Commission regarding financial oversight.
5. Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

If the GOC wishes to direct OPEGA to begin fieldwork for the purpose of conducting a full evaluation of, and report on, the financial oversight of MCILS, OPEGA proposes the areas listed above for the scope of that work. If approved, OPEGA Analysts will examine the effectiveness of MCILS's financial controls in the prevention, detection and correction of inappropriate or unnecessary expenditures and if those controls are adequate to guard against fraud, waste and abuse. Analysts will evaluate if the practices employed by MCILS staff (including screeners) relative to financial operations are being conducted in accordance with statute, rule and best practices, as well as whether they are effective, applied consistently, and when an appropriate standard, with efficiency. Generally, fieldwork will also evaluate the structure and management of the financial elements of the program and if the structure and management are appropriate and in alignment with the organization's purpose(s).

Although some of the areas noted in this statement have been examined to some degree by the Sixth Amendment Center Report and the 2017 Working Group, OPEGA's review will add to that work. With access to additional data, OPEGA will perform a more detailed analysis of attorney billing and expenditures made by MCILS for legal services. It is possible that this comprehensive analysis might allow for us to separate potential actual overbilling from outliers that may have been due to error or that just appear to be instances of overbilling. This work may also allow for a closer examination of the current systems employed to review billing and make expenditures to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

In consideration of the parameters cited when the GOC voted to include a review of the financial operation and oversight of MCILS onto the Approved Projects List, it is important to be clear about what this review will not evaluate. The proposed scope does not include an evaluation of:

- standards for attorneys to be on the MCILS rosters;
- quality of representation provided;
- attorney rates of pay; or
- whether or not a public defender office should be introduced.

OPEGA thanks the Committee for their consideration of this project direction statement for a full review of the financial oversight and economic use of resources by the Maine Commission on Indigent Legal Services.

## Appendix B

### GOC decision to consider review of MCILS

MCILS has previously been the subject of review by the Legislature and outside entities over the last three years. The GOC had also been asked to consider directing OPEGA to conduct a review of MCILS prior to the request that resulted in this review. In 2017, during the 128th legislative session, the GOC received a request for a review from a GOC member citing concerns related to the application of financial eligibility requirements for Court-appointed counsel, attorney billing practices, and billing and collection efforts for clients who are required to pay a portion of counsel fees. A full review was not approved by the committee at that time, but the request was added to GOC Stand-by List (pending a future vote to be added to the approved projects list/workplan) by a unanimous vote of the Committee.

A few weeks before completion of the 6AC report, a GOC member brought forward a request for the Committee to direct OPEGA to conduct a review of MCILS noting concerns with the administration of the program, its efficiency, and its oversight of the quality and effectiveness of representation, and the screening procedure used to determine eligibility for legal services. On April 12, 2019, the GOC voted to move a review of MCILS to OPEGA's Approved Projects List, with the scope limited to financial oversight and economic use of resources.

OPEGA presented a project direction recommendation which examined the various themes that emerged from preliminary research and identified several areas which potentially pose future risks to the elements of the program that are associated with financial oversight and economic use of resources.<sup>12</sup> On December 10, 2019, the GOC unanimously voted to direct OPEGA to conduct a full review of MCILS with the scope outlined in the project direction statement.

The GOC later moved to expedite some elements of the review after receiving communication from the Chairs of the Joint Standing Committee on Judiciary requesting prioritization of the MCILS review. On January 10, 2020, the GOC directed OPEGA to expedite review of the following evaluation scope items:

- Adequacy of systems and procedures used by MCILS staff to process payments and expenditures associated with providing legal representation to clients who have been determined to be indigent or partially indigent.
- Adequacy of the oversight structure of MCILS in ensuring that operations align with and accomplish the organization's purpose.

OPEGA conducted field work from January through March, 2020 using extensive quantitative analysis as well as more qualitative types of review. Some of that work included conducting interviews of MCILS staff and the current and former Commission Chairs, reviewing Commission meeting minutes, relevant statute and rules, and other relevant documents. OPEGA analyzed attorney billing data used by the agency, and data provided to 6AC, as well as our own data set obtained directly from the billing system proprietor. We also selected a sample of invoices from non-attorney service providers (i.e. private investigators, expert witnesses, interpreters, etc.) to test agency invoice review, approval, and audit practices.

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<sup>12</sup> See Appendix A Project Direction Statement for full list of themes.

## Appendix C

### Comparison of Sixth Amendment Center and OPEGA review of attorney billing

One of the primary drivers for this review were the issues noted in the 6AC report—particularly the number of annual hours billed by rostered attorneys—that were later reported by the media as potential examples of overbilling and/or fraud. With access to additional data directly from the billing service provider, OPEGA was able to perform a more detailed analysis of attorney billing and payments made by MCILS for legal services. The intention of this comprehensive analysis was to identify and separate instances in which outlying values resulting from data input errors or inconsistencies that otherwise—and incorrectly—appear to be instances of overbilling from true, potential instances of overbilling within the dataset. This work allowed for the closer examination of the current systems employed by the agency to review billing and make expenditures, and to identify where such systems may not be adequate for an appropriate level of scrutiny and oversight.

#### Sixth Amendment Center figures

In light of the published figures, the MCILS Executive Director worked with Justice Works (proprietor of Defender Data) to pull actual billing hour entries for the highest billing attorneys and undertook his own investigation in late August and early September of 2018. The Executive Director's analysis and correspondence with the attorneys in question led to the agency's conclusion that the figures reported in the 6AC report did not reflect hours worked by those attorneys. As part of our initial work, OPEGA sought to verify the figures in the 6AC report to identify whether there were any underlying issues that fully, or partially, explained the magnitude of the figures in the report.

We obtained and reviewed the data provided to the 6AC and found it captured annual (fiscal year) billings by the attorney originally assigned to the case by the Court, which the 6AC then used to calculate the average number of hours worked per week for that assigned attorney by using the appropriate attorney rate for each fiscal year and 52 weeks per year. We found those calculations to be mathematically correct.

We also obtained and reviewed the data later obtained by MCILS staff from Justice Works for its investigation, the agency's analysis related to that investigation, and resulting correspondence between MCILS staff and selected attorneys. Issues with the scope and depth of this investigation are noted in Issue 5 on page 18.

Lastly, we worked directly with Justice Works to obtain our own dataset. That data contained, not only payments to assigned counsel, but also the actual work events (standardized entries that describe the work performed such as preparing an email, file review, phone conference with client, etc.), the durations of those events (in tenths of an hour), the attorney who performed the work—regardless of assignment—and all associated payments for that work. After performing our own analysis and comparing the three sets of data, we were able to conclude that the data provided to the 6AC should not be used to calculate an attorney's hours worked. When that data is used, the calculation can drastically overstate an attorney's hours—particularly if that attorney works in a firm with other attorneys.

Upon further inspection, the data provided to the 6AC reflected all of the annual billings for attorneys listed as the court-assigned counsel. This was problematic for two reasons:

1. Not all billings are time events. Other billing categories, such as mileage and some copy expenses, may be reimbursed through vouchers via Defender Data. These types of expenses increase annual billing totals—and subsequent calculations of weekly hours worked using those annual totals—to whatever extent they occur and are then included in the data.
2. Of significantly greater importance is that while an attorney may be the Court-assigned counsel and always recorded as such in Defender Data, the reality is that the assigned counsel is not always the attorney actually performing the work and entering and billing for that work via Defender Data. It is unclear to OPEGA how or why the data provided to the 6AC was aggregated by annual billing dollars and attorneys listed as assigned counsel, but we note that using this data instead of timed events by work attorney to calculate attorneys’ average weekly hours, inaccurately includes non-time expenses and potentially misattributes the work hour of several attorneys to only one attorney.

To illustrate the effect of misattributing the work hours of multiple attorneys working on a case to only the assigned attorney, we selected the most prominent example of high weekly hours cited in the 6AC report—Attorney 2 receiving \$307,381 in annual pay from MCILS in FY16 representing 98.52 hours worked per week. Using the data provided to 6AC, we identified Attorney 2 and then queried the OPEGA-obtained data set to identify total FY16 payments for time events on cases in which that attorney was the assigned counsel and any other attorneys whose work or payments would be captured in that total (but misattributed to Attorney 2). The results of that query are presented in Table 1.

| <b>Table 1: Comparison of 6AC and OPEGA Example FY16 Attorney Billing Attributions</b>  |                        |  |                      |                    |
|---|------------------------|--|----------------------|--------------------|
| <b>6AC</b>  |                        | <b>OPEGA</b>   |                      |                    |
| <b>Attorney</b>   | <b>FY16 Annual Pay</b> | <b>Assigned Attorney</b>   | <b>Work Attorney</b> | <b>FY16 Amount</b> |
| Attorney 2  | \$ 307,381.00          | Attorney 2   | Attorney 2           | \$ 152,329.25      |
|   |                        | Attorney 2   | Attorney H           | \$ 41,381.25       |
|   |                        | Attorney 2   | Attorney I           | \$ 31,909.00       |
|   |                        | Attorney 2   | Attorney J           | \$ 18,688.25       |
|   |                        | Attorney 2   | Attorney K           | \$ 15,399.50       |
|   |                        | Attorney 2   | Attorney L           | \$ 12,674.00       |
|   |                        | Attorney 2   | Attorney M           | \$ 11,715.50       |
|   |                        | Attorney 2   | Attorney N           | \$ 10,676.75       |
|   |                        | Attorney 2   | Attorney O           | \$ 10,625.25       |
|   |                        | Attorney 2   | Attorney P           | \$ 3,382.25        |
|   |                        | Attorney 2   | Attorney Q           | \$ 240.00          |
|   |                        | Attorney 2   | Attorney R           | \$ 155.50          |
|   |                        | Attorney 2   | Attorney S           | \$ 137.50          |
|   |                        | Total Paid on Vouchers In Which Attorney 2 Was The Assigned Attorney |                      |                    |
| Source: FY16 Table on Page 81 of 6AC report “The Right to Counsel in Maine” and OPEGA analysis of MCILS voucher data obtained from Justice Works. |                        |  |                      |                    |

In this case, analyzing FY16 payments by the assigned counsel and the attorney actually performing work on those cases, paints a very different picture of Attorney 2’s actual hours worked. Over half of the payments—and hours calculated by the 6AC—were for work performed by other attorneys.



Overall, we observed that misattributed earnings impacted many of the attorneys listed in the 6AC report, which included a table showing the top ten earners over the period as calculated from the data they obtained. Using our data, we were able to remove payments for attorneys other than the assigned counsel working on those cases. The 6AC’s five-year totals for their top ten earners, as well as our five-year totals for those same ten attorneys, are presented in Table 2.

| <b>Table 2: Comparison of 6AC and OPEGA FY14-FY18 Total Attorney Billing Attributions By Attorney</b>  |                                   |                                     |                   |
|--|-----------------------------------|-------------------------------------|-------------------|
| <b>Attorney</b>  | <b>6AC<br/>FY14 - FY18 Totals</b> | <b>OPEGA<br/>FY14 - FY18 Totals</b> | <b>Difference</b> |
| Attorney 2   | \$ 1,189,361.37                   | \$ 687,487.75                       | \$ 501,873.62     |
| Attorney 8   | \$ 793,967.06                     | \$ 678,928.00                       | \$ 115,039.06     |
| Attorney 13  | \$ 745,311.76                     | \$ 591,918.00                       | \$ 153,393.76     |
| Attorney 5   | \$ 665,058.50                     | \$ 653,566.50                       | \$ 11,492.00      |
| Attorney 11  | \$ 662,753.12                     | \$ 565,939.85                       | \$ 96,813.27      |
| Attorney 7   | \$ 658,486.60                     | \$ 654,886.55                       | \$ 3,600.05       |
| Attorney 9   | \$ 657,896.39                     | \$ 646,919.50                       | \$ 10,976.89      |
| Attorney 3   | \$ 621,673.26                     | \$ 403,545.00                       | \$ 218,128.26     |
| Attorney 4   | \$ 618,086.99                     | \$ 497,726.30                       | \$ 120,360.69     |
| Attorney 10  | \$ 610,092.76                     | \$ 593,382.50                       | \$ 16,710.26      |
| Source: Five Year Summary Table on Page 83 of 6AC Report “The Right to Counsel in Maine” and OPEGA analysis of MCILS voucher data obtained from Justice Works. |                                   |                                     |                   |

Because misattributed earnings were used to calculate hours per week, some of those figures—particularly among the highest reported—were also overestimated. Using a similar methodology as the 6AC to calculate average hours worked per week, we calculated figures based on work attorney earnings. Table 3 shows the number of instances in which an attorney was calculated to have worked more than 40 hours per week as calculated by 6AC compared to those instances we calculated using the OPEGA obtained data and stratified by ranges of hours.

| Table 3: Comparison of 6AC and OPEGA Distributions of Attorney Average Hours Worked Per Week By FY |      |       |      |       |      |       |      |       |      |       |              |       |
|--|------|-------|------|-------|------|-------|------|-------|------|-------|--------------|-------|
| Average Hours Worked Per Week  | FY14 |       | FY15 |       | FY16 |       | FY17 |       | FY18 |       | 5 YEAR TOTAL |       |
|  | 6AC  | OPEGA | 6AC  | OPEGA | 6AC  | OPEGA | 6AC  | OPEGA | 6AC  | OPEGA | 6AC          | OPEGA |
| 40-45  | 5    | 6     | 6    | 7     | 7    | 6     | 4    | 6     | 14   | 11    | 36           | 36    |
| 45-50  | 2    | 0     | 3    | 3     | 1    | 1     | 4    |       | 5    | 6     | 15           | 10    |
| 50-55  | 1    | 2     | 2    | 1     |      | 2     | 1    | 2     |      | 2     | 4            | 9     |
| 55-60  |      |       |      | 1     | 2    |       | 1    | 1     | 1    | 2     | 4            | 4     |
| 60-65  | 1    |       |      |       | 1    | 1     |      |       | 1    | 2     | 3            | 3     |
| 65-70  | 1    | 1     |      |       |      |       |      |       | 1    | 1     | 2            | 2     |
| 70-75  | 1    |       |      | 1     |      |       | 1    |       | 1    |       | 3            | 1     |
| 75-80  |      |       |      |       |      |       |      |       |      |       | 0            | 0     |
| 80-85  |      |       |      |       |      |       |      |       |      | 1     | 0            | 1     |
| 85-90  |      |       |      |       |      |       |      |       | 2    |       | 2            | 0     |
| 90-95  |      |       | 1    |       |      |       |      |       |      |       | 1            | 0     |
| 95-100   |      |       |      |       | 1    |       |      |       |      |       | 1            | 0     |
| Total  | 11   | 9     | 12   | 13    | 12   | 10    | 11   | 9     | 25   | 25    | 71           | 66    |

Source: Annual Tables on Pages 80 - 82 of 6AC report “The Right to Counsel in Maine” and OPEGA analysis of MCILS voucher data obtained from Justice Works.

## Appendix D

### Additional results of OPEGA's review of non-counsel invoices

OPEGA also identified one instance in which an invoice for private investigation services was paid twice. Private investigation services, like other non-counsel services (expert witnesses, interpreters, etc.), are to be preapproved by either MCILS staff or the Court. The agency records these preapprovals in a series of spreadsheets with the court of record, docket number, attorney, defendant, vendor, and approved amount. These spreadsheets are intended to serve as a control as paid amounts and remaining balances are tracked and recorded. OPEGA reviewed 13 invoices comprising six different instances of potential duplicate (5 occurrences) or triplicate (1 occurrence) payments. Within these six instances, we identified the following scenario in which a (partial) invoice was paid more than once:

- 12/29/10: Court authorizes \$1,000 for defendant to employ a private investigator.
- 3/16/11: The defendant's attorney submits the private investigator's invoice. The invoice total is \$1,411.32.
- 4/5/11: MCILS Executive Director authorizes payment of \$1,000 (presumably based on the 12/29/10 order).
- 4/12/11: MCILS Deputy Executive Director reviews the defendant's request for funds and authorizes the expenditure of up to \$411.32 nunc pro tunc<sup>13</sup>.
- 4/14/11: MCILS Executive Director authorizes payment of \$411.32.
- 5/13/11: The defendant's attorney submits the private investigator's invoice with a note that the attached bill is for \$411.32, as it is the remainder of the original invoice that had not been paid in full. The line item descriptions (people, places, dates, and services) referenced on the invoice are the same as those cited on the 3/16/11 invoice.
- 6/1/11: MCILS Executive Director authorizes payment of \$411.32.

The preapproval spreadsheets have two entries for these services for this defendant and docket number: one for \$1,000 and one for \$411.32. For these transactions, the control (the spreadsheet and its review) did not appear to catch the duplicate payment of \$411.32.

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<sup>13</sup> This term is commonly used in the legal system to indicate a ruling or order applies retroactively to an earlier decision.



MAINE COMMISSION ON  
INDIGENT LEGAL SERVICES

John D. Pelletier, Esquire  
Executive Director

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October 15, 2020

Senator Justin Chenette, Senate Chair  
Representative Anne-Marie Mastraccio, House Chair  
Government Oversight Committee

Dear Senator Chenette and Representative Mastraccio:

As chair of the Maine Commission on Indigent Legal Services (MCILS), I write to acknowledge receipt of OPEGA's Confidential Draft Report, pursuant to Title 3 §997(1) of OPEGA statute. I am pleased to offer this formal agency comment in advance of the report's submission to the Government Oversight Committee and subsequent public hearings.

The eight current members of MCILS, all appointed by the Chief Executive, have been in place since the fall of 2019. As we have undertaken to more fully understand the landscape of how indigent legal services are provided in the State of Maine, a consensus has developed within the Board that is largely consistent with the conclusions outlined by OPEGA staff. We wish to make the following summary reply:

1. The Commission has no disagreement with any of the actual facts stated in the report.
2. There is gross underfunding for appropriate agency staffing.
3. The significant inadequacies OPEGA has identified with respect to financial procedures and oversight structure cannot solely be attributed to inadequate funding.
4. More broadly, the five specific conclusions reached by OPEGA in Part II of its report are serious and require more urgent action by the Commission than that undertaken to date.
5. The Commission largely agrees with the conclusions of OPEGA in Part III of its report addressing structure and oversight.

As further background, I note that the "new" Commission has set up a number of Subcommittees tasked with particular areas of system operation. These include:

- a. Subcommittee on Financial Oversight
- b. Subcommittee on Practice Standards
- c. Subcommittee on Training
- d. Subcommittee on Public Defender

Before implementing any specific changes to current operations, the Commission wanted to have the benefit of this OPEGA report. Armed with this review, as well as the thoughtful analysis of the Sixth Amendment Center, the Commission feels well positioned to make the kinds of significant changes needed to accomplish its statutory mission.

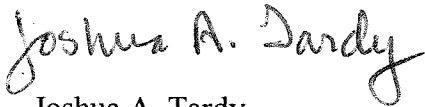
With specific reference to staffing, last October the Commission submitted its Supplemental Budget request to the Chief Executive to hire an additional attorney to enhance capacity for training and supervision of attorneys and a person with financial and audit skills to improve oversight of attorney billing. Further, a couple weeks ago, the Commission made a request to the Chief Executive for the upcoming biennial budget for additional staffing needed to fulfill our statutory mission. We are also looking at issues related to our current staffing.

The Government Oversight Committee should also understand that, consistent with key recommendations in the Sixth Amendment Center Report, the Commission has recommended establishing a Public Defender Office in one Maine county on a pilot basis. As Committee members may know, Maine is the only state in the country that does not provide indigent legal services through a public defender's office in at least a portion of the state.

Finally, we want to highlight that the current report addresses only two issues from OPEGA's work plan. The Commission's budget request addresses these issues, as well as the need to better ensure the quality of representation to meet the statutory obligation to provide efficient, high-quality representation to indigent criminal defendants, juvenile defendants and children and parents in child protective cases. We welcome the office's final report.

We thank you for your diligent interest in indigent legal services and look forward to participating in the public hearings around this report.

Respectfully submitted,

A handwritten signature in cursive script that reads "Joshua A. Tardy".

Joshua A. Tardy  
Chair, Maine Commission on Indigent Legal Services